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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 1222

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

UNIVERSAL-RUNDLE CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Universal-Rundle Corporation, respectfully files its brief in opposition to the petition for writ of certiorari and prays that said petition be denied because, as shall hereinafter be shown, there is no reason to grant the said writ.

Jurisdiction

The petition herein was filed on April 15, 1966. On April 21, 1966, Mr. Justice Clark extended the time in which to file this opposing brief until June 20, 1966.

Counter-Statement of Question Presented

Whether the Court should grant certiorari to review a holding by the Court of Appeals that the Federal Trade

Commission by ignoring the overriding policy of the amended Clayton Act had patently abused its discretion in refusing to stay, temporarily, a price discrimination cease and desist order issued against respondent, a small plumbing fixture manufacturer, for engaging in an industrywide practice, while simultaneously refusing to take any action concerning such practices by the dominant manufacturers in the industry, especially when the Court of Appeals' decision does not require the FTC to take any action in this case which is not consistent with the FTC's actions in other industries, namely, to proceed in accordance with that Agency's announced policy of seeking industrywide compliance where violations are industrywide in scope.

Statement

The Federal Trade Commission entered a cease and desist order against respondent, Universal-Rundle Corporation, on June 12, 1964. The sole basis for the order, as stated in the Commission's accompanying opinion, was that respondent had violated Sec. 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. 13(a), by granting discounts from its published wholesaler net prices in connection with sales of plumbing fixtures made in truckload quantities (R. 30-45).[1] The Federal Trade Commission limited its evidence to a showing that respondent had three customers who on a total of seven occasions during 1957 (the year covered by the evidence) bought in truckload quantities and received truckload discounts. Although respondent manufactured and offered for sale several hundred different products, truckload discounts were shown to have been granted on just seventeen different model plumbing

[1] "R" refers to the "Appendix to Brief for Petitioners" filed by respondent in the court below.

fixtures. (Comm. Exhs. 80A through 89Z14, Comm. Exhs. 75 and 76).

On July 20, 1964 respondent, following the procedure approved by the Federal Trade Commission itself,[1] moved the Commission to stay the effective date of the cease and desist order for at least eighteen months in order that the Commission might investigate and take whatever action it deemed appropriate against respondent's competitors for engaging in the practice of granting truckload discounts. Completely consistent with the position taken by it during the course of the trial,[2] respondent asserted that its six major competitors were granting truckload discounts on sales of plumbing fixtures made in such quantities. The FTC was shown that respondent's market share affected by the order was less than 6%, while, as a group, four of its competitors' share was approximately 66%. The leading company's share was approximately 32% (R. 50).

Respondent attached to this petition documentary proof in the form of price lists by these competitors containing their wholesale net prices for plumbing fixtures, plus bulletins issued by these manufacturers offering truckload discounts which averaged approximately 18% below

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[1] The Commission has ruled that a request for a stay of the effective date of an order on the grounds that competitors are engaging in the challenged practice is premature when made prior to the entry of a cease and desist order. *In re Admiral Corporation*, 56 F.T.C. 1627, 1629-30 (1959).

[2] The statement on page 3 of the petition that respondent in requesting the stay was "alleging for the first time that the granting of truckload discounts was an industry-wide practice" is in error. (R. 457).

their published wholesale net prices.[1] The authenticity of this documentary material is not challenged. Respondent also attached to its request for a stay an affidavit executed by its Vice-President in Charge of Sales to the effect that the said competitors were in fact granting the 18% truckload discounts; that each of the competitors had two or more customers in the several trading areas of the country, some of whom did not buy in truckload quantities; and that unless the Commission took some action respondent would be the only member of the industry under a cease and desist order and would suffer competitively as a result thereof[2] (R. 54-56).

Respondent did not ask that the cease and desist order against it be held in abeyance until its competitors were placed under similar orders, or that the eventual enforcement of the cease and desist order against it be made contingent upon the Commission's success in proceedings against respondent's competitors. Respondent asked only that the effective date of the order against it be stayed for a specified time period pending an investigation by the Commission of its competitors. So confident was respondent that the Commission would follow its an-

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[1] The petition (at pp. 3-4) undertakes to describe the documentary material attached to respondent's request for a stay, but neglects to mention that the truckload discount bulletins issued by respondent's competitors showed an average discount of 18%. Based on the record in the instant case, the FTC had found respondent's truckload discounts which averaged 10% were sufficient to cause the probability of competitive injury on the buyer level. (R. 43)

[2] It was also brought to the Commission's attention that respondent had incurred substantial losses, exceeding $500,000, during each of the three years immediately preceding the entry of the order, as contrasted to the substantial profits of its dominant competitors (R. 51-52).

nounced policy (see pp. 16-20, *infra*), once it had investigated these other industry members, and treat it in a completely fair and equitable manner, that respondent agreed to forgo its right to judicial review of the order against it if the requested relief were to be granted (R. 46-47).

The Federal Trade Commission refused to grant the requested relief on the ground that respondent's showing was insufficient to warrant the Commission's taking any action. In denying the stay, no finding was made that there might be an adverse effect on competition if the effective date were postponed. In its order denying respondent's request, the FTC took the position that before that Agency would be justified in commencing an investigation of respondent's competitors, it would be necessary for respondent to submit to it evidence probative of every element of a *prima facie* case and, in addition, to submit evidence tending to negate the existence of possible affirmative defenses.[1] While the Court of Appeals did not criticize the Commission for this part of its ruling, respondent respectfully submits that the Federal Trade Commission, the Court of Appeals and this Court know full well that these are not the standards usually applied by the FTC in determining

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[1]The FTC's order, in pertinent part, reads:

". . . It must be determined in each case whether the discount creates a price difference, whether the recipient of such a discount is competing at the same functional level with a customer paying a higher price, whether the customer buying in less than truckload quantities is able to avail itself of a truckload discount, and whether the differential is sufficient in the competitive conditions shown to exist to have the required anti-competitive effects. Moreover, even if a prima facie violation of Sec. 2(a) is established, the seller may in each case interpose the statutory defense to justify the discrimination." (R. 63)

whether to investigate claimed violations of Section 2(a) of the Act.[1] If they were, the FTC would still be waiting to commence the first Robinson-Patman investigation.

In reviewing the Commission's refusal to stay the effective date of its cease and desist order and the Commission's refusal to take any action with regard to respondent's competitors, the Court of Appeals ruled that respondent had made a "strong showing" that its competitors were currently engaging in the same practice as was found to be illegal when done by respondent. The Court of Appeals ruled that under these circumstances the Commission's flat refusal to take any action concerning respondent's competitors was a patent abuse of its administrative discretion because such a refusal was inconsistent with the overriding policy of the Clayton Act, stating:

> "We are not convinced that the Clayton Act requires us to approve the imposition of sanctions upon only one of the smallest of a group of law violators. If we did, the giants in the field would be the real benefactors—not the public."
>
> (352 F. 2d 831, at 834)

The Court of Appeals further ruled that respondent's showing was sufficient to place upon the Commission a

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[1] The FTC in its ruling said it must be determined "whether the customer buying in less than truckload quantities is able to avail itself of the truckload discount, . . ." (R. 63). The FTC didn't have to conduct an investigation to determine this point with regard to respondent's competitors' customers. The record shows that five of the six customers the FTC deemed incapable of buying in truckloads from respondent, also contemporaneously bought plumbing fixtures from one or more of the six competitors (R. 250; R. 384; R. 408; R. 480; R. 481-2).

duty to investigate and that it could not condone the Commission's refusal to perform that duty (352 F. 2d 831, at 835).

Reasons for Denying the Writ

The decision of the Court of Appeals is simply a proper application of a well-settled principle that it is a patent abuse of administrative discretion for an agency to make a decision which is inconsistent with the overriding legislative purpose sought to be attained by the enactment of the statute whose enforcement Congress has entrusted to the agency. In the recent case of *NLRB* v. *Brown,* 380 U.S. 278 (1965), this Court ruled:

> "Reviewing courts are not obligated to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." (380 U.S. 278, 291-292)

The permissible latitude for the exercise of discretion by an administrative agency is not so unlimited so as to permit an agency to "lose sight of the law". *General Protective Committee, etc.* v. *S. E. C.,* 346 U.S. 521, 536 (1954). This Court has also ruled that agency actions which are not in conformance with the overriding standard laid down by Congress for that agency are not legitimate exercises of administrative discretion. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, at 167 (1962).

The case at bar was brought by the Federal Trade Commission under its statutory authority and duty to enforce the provisions of the amended Clayton Act. That the overriding purpose of this Act, as well as all the antitrust statutes, is to preserve the competitive process as

the cornerstone of the nation's economic system is so well established that for respondent to embark upon a discussion of the legislative policy sought to be effectuated by these laws would be but to belabor the obvious. The Court of Appeals has found that the Commission's order denying respondent's request for a stay and its concomitant refusal to make any investigation of respondent's dominant competitors, would benefit only the "giants in the field". It is clear that the "giants in the field" would "benefit" from respondent being under a final order. To comply with this order, respondent must drop those customers unable to buy in truckloads. This would further decrease respondent's small market share, and quite obviously increase the existent substantial market shares of the dominant competitors who are free to sell at the higher less-than-truckload prices to these former customers. Obviously, the antitrust laws were not enacted to attain such an objective. The petition not only fails to take issue with this holding, which serves as the keystone of the Court of Appeals' decision, *it doesn't even bother to mention it.*

Rather than discuss anything as insignificant as the basic underlying purpose of the Clayton Act, the petition takes the position that this Court laid down a well-nigh inflexible rule in the consolidated cases of *Moog Industries, Inc.* v. *F.T.C.* and *F.T.C.* v. *C. E. Niehoff & Co.* 355 U.S. 411 (1958), to the effect that Courts of Appeals may not interfere with Federal Trade Commission decisions denying stays of the effective dates of cease and desist orders. In its treatment of this Court's *Moog-Niehoff* decision, the petition overlooks entirely the factual background present in those cases, as well as the rationale underlying the decision.

Moog and *Niehoff* were just two of a large number of cases involving annual volume rebates in the "auto parts"

industry. The Federal Trade Commission had already investigated the industry, *as an industry,* and brought cases against those companies found to be granting annual volume rebates.[1]

The critical question in *Moog-Niehoff* was whether a cease and desist order should go into effect against one competitor prior to the time at which other competitors, *who were already being prosecuted or investigated,* were brought under similar orders. This Court held that it would unduly hamper the Commission in the performance of its duty if the Commission under such circumstances could issue only simultaneous cease and desist orders. What was at issue in *Moog-Niehoff,* then, was the Commission's discretion in setting up its own timetable. No issue was raised in those cases relating to a refusal on the part of the Federal Trade Commission to take any action against competitors of the respondents therein.

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[1] The Court's attention is invited to the Commission's brief filed with this Court in *F.T.C.* v. *Niehoff & Co.,* October Term 1957, No. 110. Therein (at p. 19) it is stated: "Respondent [Niehoff] is not in a position to complain that the Commission made it a legal guinea pig. Within a relatively short time before or after the filing of the complaint against [Niehoff] the Commission filed 14 Section 2(a) complaints against members of the automotive replacement parts industry. Courts of Appeals have affirmed the . . . orders issued in six of these proceedings . . . Two of the orders were against companies engaged in selling ignition line parts and named by respondent as competitors." (Footnotes omitted.) At the time of this Court's decision in *Niehoff,* a third competitor was under an order and three others had been cited in F. T. C. price discrimination complaints. See: *Standard Motor Products,* 54 F. T. C. 814; *Guaranteed Parts Co., Inc.,* 53 F. T. C. 433; and *Thermoid Company,* 55 F. T. C. 518.

The Federal Trade Commission itself has asked this Court to recognize the distinction between "timetable" cases—that is to say, cases wherein proceedings have already been brought against a number of competitors—as opposed to cases wherein one member of an industry has been singled out. In a brief filed on behalf of the Commission in this Court less than six months ago in the case of *United Biscuit Company of America* v. *F. T. C.*,[1] the following statement appears:

> "Thus, this is not a situation in which petitioner has been singled out for enforcement action while other important members of the industry engaging in similar practices are ignored." (Brief for the Federal Trade Commission in Opposition, Case No. 888, October Term, 1965, p. 10)

Thus, in a case wherein the same issue—the holding in abeyance of a price discrimination order—was raised, this Court was asked to take note that the discriminator's competitors had been prosecuted, and were under orders to cease and desist. Yet in the case at bar the entire tenor of the FTC's petition is to the effect that the refusal to investigate, much less prosecute, respondent's competitors is without any significance whatsoever. The total lack of consistency between these two positions is manifest.

This Court's *Moog-Nichoff* opinion strongly supports the Court of Appeals decision herein. While the petition

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[1] Certiorari was denied on Feb. 28, 1966, ... U.S. ....., 15 L.Ed. 2d 845. United was the last of five biscuit product manufacturers placed under 2(a) orders for an industry-wide practice. *United Biscuit Co.* v. *F. T. C.*, 350 F. 2d 615 (1965). See *National Biscuit Co.*, 50 F. T. C. 932, *Sunshine Biscuit Co.*, 52 F. T. C. 110; *Shultze & Burch Biscuit Co. and Robert A. Johnston Co.*, 1963-1965, Tr. Reg. Rep., Transfer Binder § 16,749.

would stress the limitation placed upon Courts of Appeals in that opinion, it ignores entirely this Court's views as to just what the Federal Trade Commission's duties are in a situation such as the one presented in the case at bar.

In *Moog-Nichoff*, this Court held that the Commission had a *duty to investigate competitors to determine if proceedings were warranted.* The opinion states:

> "... although an allegedly illegal practice may appear to be operative throughout an industry, *whether such appearances reflect fact* and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment *are questions that call for discretionary determinations by the administrative agency.*" (355 U.S. 411, at 413, emphasis supplied)

Can the Commission in the instant case be fairly considered to have made the "discretionary determination" referred to in the above quoted passage of the *Moog-Nichoff* decision? Is a flat refusal to even look at respondent's dominant competitors' pricing practices the equivalent of a "discretionary determination"? Obviously, the Court of Appeals thought not. In this regard it is highly significant to note that the Court of Appeals in this case did not command the Commission to hold the order against respondent in abeyance until similar orders were entered against respondent's competitors, but merely held that the Commission, following the showing made by respondent, had an obligation to make an investigation. The Court of Appeals' ruling reads as follows:

> "An investigation of an industry is germaine to a proceeding before the Commission and it has a duty to so investigate in a proper case. We have already indicated our view that petitioner's [respondent's] showing was sufficient to require the Commission to

make petitioner's competitors parties thereto. The Commission was the proper forum to receive and act upon the result of such an investigation." (352 F. 2d 831, at 835).

Respondent respectfully submits that the Court of Appeals holding only requires the Federal Trade Commission to ascertain the facts which it must of necessity have in order to make the discretionary determination which this Court in *Moog-Niehoff* ruled was incumbent upon it.[1] The Commission's refusal to perform that duty is clearly contrary to this precedent and is a patent abuse of administrative discretion.

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[1] The FTC has expressly recognized the necessity for making such a discretionary determination in a case presenting a similar situation to the one at bar. Thus, in *Atlantic Products Corp. and Atlantic Products Sales Corp.*, ... F. T. C. ..... (1963), FTC Doc. 8513, 1963-1965, Tr. Reg. Rep., Transfer Binder, § 16,676, the Commission ruled as follows:

> "Responsible exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order so that a general practice may be dealt with more comprehensibly, may involve consideration of the circumstances going beyond those reflected in the particular record. In the circumstances here, we are inclined to withhold entry of a cease and desist order against the instant respondent pending the outcome of the projected industrywide proceeding."

In the case at bar, even though a strong showing[1] had been made that this respondent's larger competitors were engaged in granting truckload discounts, the exact practice concerning which a violation upon respondent's part had been found, the Federal Trade Commission refused to even investigate respondent's claims. This, in effect, was a decision upon the part of the Commission to ignore these competitors.

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[1] The petition confines its challenge to the Court of Appeals' conclusion that a "strong showing" as to respondent's competitors' pricing tactics had been actually made to a footnote on page seven of the petition. Therein it is claimed that respondent didn't actually prove that the granting of truckload discounts by its competitors was illegal. Such a position, we submit, is almost ludicrous. Respondent has no power to subpoena witnesses and compel the production of documents for this purpose. Respondent did show by documents issued by its competitors, that these companies were, in fact, offering truckload discounts far in excess of those condemned by the FTC in the instant case. Certainly this was sufficient, especially in view of the circumstance that the FTC had already condemned this practice when done by one member of the same industry, to give the FTC ample reason to believe that respondent's competitors might be violating the law. *Respondent is confident that the Federal Trade Commission really doesn't mean to imply to this Court that it never undertakes investigations except when some complainant presents it with an airtight, open and shut case.*

Next, it is claimed in the same footnote that respondent grants truckload discounts on its full line of fixtures in any combination, whereas every other manufacturer grants truckload prices on only a few specified items. Neither the Federal Trade Commission nor the Court of Appeals considered this point since it was never raised until a petition for rehearing was filed in the latter forum. This belated claim ignores the affidavit of respondent's Vice President (which could have been, but was not, controverted either before the Commission or the Court of Appeals) to the effect that it was his belief that competitors were, in fact, granting truckload discounts on all fixtures which they offered for sale (R. 54-56).

A decision to prosecute one law violator while simultaneously refusing to do anything about similar violations on the part of the violator's dominant competitors is grossly unfair. The FTC by its actual Robinson-Patman Act enforcement programs since this Court's decision in *Moog-Niehoff,* and its reports to the Congress, as well as in numerous speeches by the Commission Chairman and other present members of the FTC, has recognized the

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[1] (Continued)

In this footnote it is further claimed that the showing made by respondent in its petition for a stay is weakened by the fact that its stated market share (5.75%) did not include sales made by it to Sears, Roebuck and Co. The omission of the Sears' sales in this figure was clearly stated to the Commission in respondent's original request for a stay and had no apparent bearing on the Commission's decision (R. 50). Just wherein its significance lies is not explained in the petition.

Finally, in this footnote it is inferred that respondent might have misled the Commission and that the Court of Appeals erred, in connection with the number of manufacturers in the plumbing fixture industry (R. 50). The petition cites a pamphlet issued by the Bureau of Census which supposedly proves that there are at least 68 companies in the plumbing fixture manufacturing business (U. S. Department of Commerce, Bureau of Census, *Current Industrial Reports, Plumbing Fixtures,* Second Quarter 1965 (September 9, 1965)). The cited pamphlet was *not* introduced in evidence in this proceeding, but was first cited in the F T C's petition for rehearing before the Court of Appeals wherein the same claim was asserted. This pamphlet explicitly states that the statistics therein contained are compiled not only from manufacturers of vitreous china and cast iron bathroom and kitchen plumbing fixtures, the only products with which the instant proceeding is concerned, but also includes statistics relating to manufacturers of concrete, earthenware, aluminum, monel, metal, and other type fixtures, including drinking fountains, laundry set tubs and shower stall bottoms. Respond-

unfairness inherent in such conduct. The petition cannot cite a single precedent since *Moog-Niehoff* in which the FTC has singled out one company—much less one of the smallest in an industry—for engaging in an industrywide pricing practice, entered a final order against only that

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[1] (Continued)
ent submits that although such products may be generically classified as plumbing fixtures for purposes of Census reports, they are not competitive with the products sold by the seven companies referred to in the Court's decision. In any event, the number of competitors, standing alone, is a relatively meaningless statistic in evaluating competitive conditions. This Court has long been in agreement with the position espoused by both the Federal Trade Commission and the Department of Justice that it is the *degree of concentration* which is the most appropriate barometer of the state of competition in a given industry. *No challenge* has ever been made as to the correctness of respondent's assertion that the four leading plumbing fixture manufacturers enjoy 66% of the industry's volume.

On the question of degree of concentration in the plumbing fixture industry, it is interesting to note the court's decision in *Briggs* v. *Crane,* 185 F. Supp. 177 (E.D. Mich. 1960), aff'd 280 F. 2d 747 (6th Cir., 1960). The District Court, in enjoining Crane from acquiring Briggs' stock, found that the plumbing fixture industry was "highly concentrated" (Briggs' and Crane's combined share was about 16%), fixture manufacturers were limited to "approximately 10 companies" and no new manufacturer had entered during the previous 10-year period (185 F. Supp. 177, at 184). The F T C's *amicus* brief on behalf of Briggs did not contend there were 68 plumbing fixture manufacturers in 1960. Respondent submits this Court would be on safe grounds in concluding there is little likelihood that some 58 companies have commenced manufacturing plumbing fixtures in the six years since the District Court in *Briggs* found the plumbing fixture industry "highly concentrated".

company, and refused to take any action against others in the same industry for a similar illegal practice.[1]

A review of the cases instituted by the FTC since *Moog-Niehoff* shows the FTC has, in fact, adopted a policy for Robinson-Patman Act enforcement and that policy is an industrywide approach whenever the FTC has reason to believe that competitors are engaging in similar pricing practices in violation of the Act. Certainly the FTC cannot suggest that the 11 complaints, all issued on the same day, challenging the same practice on the part of magazine publishers, occurred through sheer coincidence.[2] Similar treatment has been accorded to competitors in the Florida citrus fruit industry (over 90 orders),[3] in the garment industry (over 220 orders,[4] in the carpet industry (11

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[1] Appendix C to the petition lists five Robinson-Patman Act decisions in which stays of orders have been denied. In none of these cases did the FTC enter an order against only one company and refuse to investigate others in the same industry engaged in the same pricing practice. In *United Biscuit Co.*, *Pacific Molasses,* and *Southern Fruit,* competitors of the cited companies were under final orders at the time the stays were denied. In *Graber Mfg. Co.* no order has yet been entered against that respondent. As to *Chun King Sales,* some three years after consenting to the entry of an order (58 F. T. C. 81), Chun King requested a stay in what appears to have been an obvious attempt to avoid a penalty proceeding for violations of the final order. (See: Trade Reg. Rep., Vol. 3, § 9701.40 (1965)—reporting that penalties of $70,000 for violations of the order were imposed on Chun King.)

[2] 57 F. T. C. 13 through 52.

[3] Table of Commodities Index, 57 F. T. C. through 60 F. T. C.

[4] 1963-1965 Trade Reg. Rep., Transfer Binder §§ 16,468, 16,534 and 16,702.

orders),[1] the tobacco industry (5 orders),[2] the electric shaver industry (4 orders),[3] in the toy industry (at least 16 orders),[4] and the sea food products industry (23 orders).[5] These are but a few examples which show that the FTC is enforcing the Robinson-Patman Act on an industrywide basis. Thus, the Court of Appeals' decision does not require the FTC to embark upon some new or radical procedure but only calls for that Agency to consistently apply the very policy which it has already been following. The FTC has obviously deemed industrywide enforcement as the "policy best calculated to achieve the ends contemplated by the Congress" (*Moog-Niehoff* 355 U.S. 411 at 413), and it has not shown in its petition why that policy should not have been followed here.

The FTC in its statements to the Congress has stressed the inherent unfairness of enforcing the Act on a single competitor basis. In a recent statement prepared for the House Committee on Appropriations the FTC made the following report:

> "In enforcing the Robinson-Patman amendment to the Clayton Act . . . the FTC is tackling the problems on an industrywide basis if possible.
>
> "A key to the Commission's new approach is more careful planning of how best to cope with illegalities. Instead of shooting first and analyzing later, criteria are being further developed in our case selection to assure that we are not simply spending money and racking up statistics without commensurate results. *Simple fairness to competing business demands:* First, an analysis of the illegality to determine its character and prevalence; second, a determination of the amount

[1] 1963-1965 Trade Reg. Rep., Transfer Binder ¶6,800.
[2] 56 F. T. C. 221, 258, 263, 269 and 275.
[3] 55 F. T. C. 655, 665, 682, and 1017.
[4] 61 F. T. C. 629.
[5] 55 F. T. C., Table of Commodities Index, at p. 2166.

of public interest involved; third, that consideration be given to correcting, if possible, the illegality by illuminating it for all concerned or by accepting from violators their assurance the violation will be discontinued; and, finally, should these informal efforts fail (or be deemed insufficient), then to strike quickly at the *defiant* violator with the full force of the law. Such planning will enable the F.T.C. to husband its adversarial resources to attack hardcore violators. . . ."[1] (Emphasis supplied)

The Chairman of the FTC in his testimony before this House Subcommittee elaborated even further, stating:

"We have given a mandate to our enforcement bureaus. Instead of taking these cases as they come, one by one, the first thing they are to determine is whether or not this is an isolated situation that has come to our attention or whether it is something that is engaged in competitively by all the competitors. If so, to step back and, then with our resources, engage in what I would hope to be some basic planning and determine which would be the best tool and approach for us to take. . . ."

"Historically, the Commission was wedded to the procedure of taking our customers or their cases as they came. The Commission had hoped . . . that with the tools that Congress had afforded the Commission to work with that even on the case by case method that proceeding against one, the others, if it affected them, would take notice and follow suit. It just didn't work that way . . . . *It could be said in all fairness to these people that if there were 50 engaged in the same practice, what certainty would a party have that if they stopped, the other 49 would stop.* In our country,

[1] FTC Statement, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, Independent Offices, 89th Congress, 1st Session, Part 3, pp. 408-409. See also: Hearings before Subcommittee of the Committee on Appropriations, United States Senate, 89th Congress 1st Session, pp. 828-30.

very rarely can a man be his brother's keeper. I think this is the basis of law. We are trying to enforce our law in the American way, equitably and fairly." (at pp. 404-405) (Emphasis supplied)

The Commission's reasons for this enforcement program have been lucidly explained in several speeches by the Chairman of the Federal Trade Commission as well as other members of that Agency.[1] Chairman Dixon, in a recent address,[2] informed a group of American businessmen:

> "It must be recognized that some illegal practices are so widespread within an industry that to single out a few of the sinners would be *unfair. Simple justice would dictate* that the approach to the problem be of sufficient scope to give all violators an opportunity to rid themselves of the illegality simultaneously and without suffering competitive injury in the process." (Emphasis supplied)

In the same vein Chairman Dixon has recently stated, "The man who is willing to comply with the law simply can't afford to if his competitor is allowed to go on violating it."[3]

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[1] For the convenience of the Court, a copy of each of the speeches referred to in this Brief is being filed with the Clerk of the Court simultaneously with the filing of this opposing brief.

[2] Address by Paul Rand Dixon, Chairman of FTC, before Georgia Association of Broadcasters, Inc., Pine Mountain, Georgia, June 15, 1965.

[3] *Voluntary Law Enforcement: An Approach to "Administrative" Delay,* an address by Paul Rand Dixon, Chairman of the FTC, Briefing Conference on Restraint of Trade and Trade Regulations, Shoreham Hotel, Washington, D.C., March 17, 1965. See also a recent address of Commissioner Everett MacIntyre on *Some Criteria for Applying Industrywide Enforcement Measures under the Robinson-Patman Act,* before the Indiana Continuing Legal Education Forum, Notre Dame University, September 25, 1965.

Commissioner Mary Gardiner Jones of the present Commission, in a recent address before the Bar Association of the District of Columbia (February 25, 1965,) stated as follows:

> "Industrywide enforcement of the law is almost a constitutional imperative as a matter both of fairness and for equality before the law. It is clear that we have no right to and could not permit some violators to go free while prosecuting others."

Obviously, if this announced policy of taking an industrywide approach is the manner in which the Federal Trade Commission is enforcing the Act, there should be no occasion for cases presenting the factual situation present in the case at bar to arise in the future and, thus, no reason for this Court to review a decision wholly compatible with the FTC's policy.

In summary, it is respectfully submitted the FTC has not set forth any compelling reason why this Court should grant a writ of certiorari. The petition never questions the basic rationale underlying the decision of the lower court that the FTC's refusal to take any action against respondent's competitors is inconsistent with the overriding purpose of the Clayton Act. It sidesteps this point and instead attempts to create a non-existent conflict between the holding of this Court in *Moog-Niehoff* and the Court of Appeals' holding in the instant case. As shown above, no such conflict exists. The *Moog-Niehoff* ruling is limited to preserving to administrative agencies discretion in choosing the "policy best calculated to achieve the ends contemplated by the Congress" (355 U.S. 41, at 413). Nothing, however, in that decision countenances the adoption of a procedure which not only frustrates the Congressional purpose, but also is inherently unfair and

acknowledged to be so by the FTC itself in reporting to the Congress.[1]

CONCLUSION

The petition for certiorari should, therefore, be denied.

Respectfully submitted,

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[1] On the final page of the petition an argument is presented to the effect that "sound judicial administration requires" that the Court of Appeals first render a decision as to the validity of the Commission order before making a determination that the Commission abused its discretion by refusing to stay that order. Such an argument suggests that the Commission's hands are tied to a case by case approach in enforcing the Act and the FTC should never attempt industrywide enforcement until a final judicial determination is rendered in at least one proceeding against a member of the affected industry. This argument might have merit if in the proceeding below respondent had challenged, on legal grounds, the Commission's substantive theory of violation. No such challenge was made. The thrust of respondent's attack on the validity of the order itself was basically centered on the sufficiency of the evidence to support the FTC's findings. A decision on merits, therefore, should have no effect on the FTC's substantive theory of violation, nor, for that matter, on future efforts of the FTC to enforce the law in the plumbing fixture industry.